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### ADJ Consultancy Services

To: The Productivity Commission, Access to Justice Inquiry  
From: ADJ Consulting Services  
CC: N/a  
Date: 10 June 2014  
Re: Supplementary Submission

Dear Commissioners,

After my appearance 3 June 2014 at the Sydney hearing, I think it would be useful to clarify a few points in writing. Firstly, there was much discussion with the witnesses who preceded my appearance, about "the public interest". This is a phrase notoriously hard to define. In his doctrinal thesis, *Defining the Public Interest*, Geoffrey Edwards observes:

'Public interest' is a term applying specifically in public affairs. At any given time, rhetorical, current and normative meanings of the term coexist. Error arises from overlooking the distinctions, funding the rhetorical and current formations are inadequate as durable norms, then discarding the term as meaningless... (Current) methods of policy analysis in Australia have been politicised and have not been conducive to discerning the public interest. For example, economic commentators are nearly unanimous that economic growth is a measure of a nation's economic prosperity despite widely recognised logic and evidentiary deficiencies... Policy formulation by its very nature is goal-orientated, purposeful or problem-solving so it must be feasible to conduct it better."<sup>i</sup>

While Dr Edwards is to be commended for the interesting criteria he argues for to resolve the conundrum, even his attempt to fashion what he calls a "realisable formulation of the normative public interest"<sup>ii</sup> has to be qualified by his acknowledgement of the unlikelihood of "scholars (reaching) a consensus in the foreseeable future on how to crystallise the notion of the public interest".<sup>iii</sup> But this is not just a question for scholars, commentators or other select groups. It should be a question for all Australians through the nation's parliaments.

In part, this is what motivated me to become involved in the Recall Elections Inquiry in NSW a few years ago. Sadly, the proposal lacked a popular groundswell, shown by the low number of submissions to the Expert Panel.<sup>iv</sup> This was unfortunate, because I had hopes that NSW would test run some sort of model for citizen initiated legislation, recalls and referenda.<sup>v</sup> In my view, such procedures would be preferable to 'public interest litigation' in the courts. It reasserts the sovereignty of Parliament, which has arguably been undermined by the growth of the administrative state. This was certainly the view of former Victorian Attorney General Rob Hulls, when he told the Centennial Ceremonial Sitting of the High Court in Melbourne, in 2003, that:

In our defence of the rule of the law, we must also be alert to, and alarmed by, attempts to bypass judicial scrutiny, whether it be via privative clauses or the more insidious trend towards unenforceable guidelines. In my view, any suggestion that an Executive's "non-binding guidelines" be accepted as authoritative is dangerous terrain. Yet it is increasingly the case that we are asked the accept the legitimacy of such guidelines, whether it be in Industrial Relations, decisions concerning grants of Legal Aid, or more poignantly in the immigration area.<sup>vi</sup>

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This quote has inspired my personal advocacy for the past 11 years; it explains why, in my view, many of Australia's most vulnerable people will never have true access to justice. Equally, after 20 years of study and job hunting, personally, the thought of more pro-bono work being an acceptable answer for anyone, should be regarded as an insult. Professional people delivering professional services should be paid; equally, it seems assumed without question that disabled and other disadvantage people should accept charity (or not-for-profits more generally) as our principal means of receiving goods and services.

Any such assumption should be quickly challenged. As a citizen with a disability, I am insulted.<sup>vii</sup> One is also professionally diminished by the thought that I, or those who might seek my services, should see themselves as 'charity cases'.<sup>viii</sup> My resolution of this question (at least in part) is answered by this:

If we think of all three indicia (dignity, independence and democracy), then requiring people to live under the spectre of guidelines which are technically unenforceable but practically immutable, while also having failed to come under any Parliamentary scrutiny, should be (and be seen as) immediately unacceptable. Yet, if past practise is any indication, guidelines and MoUs will likely lay at the heart of devolution and outsourcing. Thus, our political leaders, on all sides of politics, will be able to politely excuse themselves from addressing the detail of the difficulties faced by those who are living with housing stress, disabilities and other frailties of age. However, just as the Right Hon. Pierre Trudeau sought to bring the British North America Act (the Canadian Constitution) 'home to Canada' it is long overdue to Patriation agency guidelines back home to Parliament, as regulations. From here, our citizenship cannot be ignored or 'devolved away' by any Minister or Government.

If parliamentarians still decline to follow the legitimate and (most importantly) justiciable route of approving regulations, then they should leave us free to set up our own Minder-style arrangements, liberated from the yoke of the not-for-profit/charitable sector and the bureaucracy's guidelines. Perhaps Aeschylus (quoted at the beginning of this submission) had some more Nostradamus-like insights which he thought better of mentioning?

Secondly, the importance of such a change in approach (that is: bringing guidelines back to Parliament) signifies one vital point: there is one Government in NSW (or Australia). My own experience is that larger charities in particular, can feel and function more like miniature, self-contained governments; in this I concur with earlier cited comments of Hughes about charities becoming mere 'silos of government,' but go further to suggest some become Monaco-like, containing many "regal" egocentrics, absent the casinos and Grand Prix. Meanwhile, many of the case workers in the same charitable organisations will conduct themselves in the lecturing manner observed by Aeschylus, but have neither the wit nor wisdom to ever perceive the chaos and pain they bring to other people's lives.<sup>ix</sup>

In short, to think we can improve access to justice simply by looking at the justice system in isolation is wrong. The Parliament (or as in Westminster tradition the 'High Court of Parliament') should assume more direct responsibility. While appreciating that the Westminster model does not translate exactly in the Australian federated constitutional context, it should not be entirely dismissed. In my view, if there is a discernable public interest at all, it is best expressed through Australia's parliaments and not our Courts.

Yours faithfully,

Adam Johnston

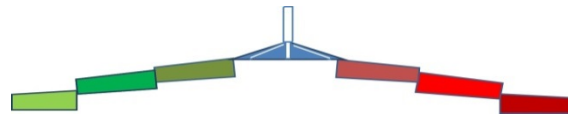
Endnotes

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<sup>i</sup> Geoffrey Edwards, *Defining the 'Public Interest'* - a thesis submitted in fulfilment of the requirements of a Doctor of Philosophy, Griffith Business School, Department of Politics and Public Policy, Griffith University, June 2007, pp. 254 – 255, <http://www.griffith.edu.au/ins/collections/adt/> as at 16 November 2012

<sup>ii</sup> See *ibid*, p.255

<sup>iii</sup> *Ibid.*, p.252

<sup>iv</sup> See generally, *Recall Elections for New South Wales? Report of the Panel of Constitutional Experts*, NSW Department of Premier and Cabinet, September 2011, [http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Recall%20Report\\_0.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Recall%20Report_0.pdf) as at 10 June 2014

<sup>v</sup> See my submission to the Expert Panel at

[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0008/131120/06\\_Johnston.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0008/131120/06_Johnston.pdf) as at 10 June 2014

<sup>vi</sup> The Hon. Rob Hulls MP, Ceremonial - *Special Sitting at Melbourne - Centenary of High Court of Australia* [2003] HCATrans 406 (6 October 2003) Last Updated: 25 November 2003, [2003] HCATrans 406, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2003/406.html?stem=0&synonyms=0&query=%20high%20court%20centenary> as at 20 June 2010

<sup>vii</sup> See for example, my submission to the NSW Public Accounts Committee: *Efficiency and Effectiveness of the Audit Office of NSW (Inquiry)*, available at [https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/\\$FILE/Submission%20No%207.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/$FILE/Submission%20No%207.pdf) as at 10 June 2014. In this submission I ask whether the outsourcing of community services has denuded many people of their citizenship.

<sup>viii</sup> It is worth noting how many negatives come with not-for-profit service provision. In terms of employment, I would describe many disability employment schemes as appalling and indefensible, in regards of terms and conditions offered to employees with disabilities; see Appendix 1 and also my subsequent submission to the (Australian Law Reform Commission) ALRC's Inquiry into *Equity, Capacity and Disability in Commonwealth Laws* at

[http://www.alrc.gov.au/sites/default/files/subs/12\\_a\\_johnston.pdf](http://www.alrc.gov.au/sites/default/files/subs/12_a_johnston.pdf) as at 10 June 2014

<sup>ix</sup> Document 'in confidence' pp. 11-12

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